SUPREME COURT, U. S

NOV 8 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-564

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, EX. REL., EDWARD VASSALLO,

Petitioner,

-against-

ARTHUR RUBIN, WARDEN OF THE QUEENS HOUSE OF DETENTION FOR MEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
The Opinion of the Court Below	2
Jurisdiction	2
The Questions Involved	2
The Principle Constitutional And Statutory Provisions Involved	3
Statement of the Case	6
Reasons for Granting the Writ	10
Conclusion	18
Appendix A	21
Appendix B	22
Appendix C	24
Appendix D	28
Appendix E	29

CASES CITED

Barker v. Wingo, 407 U.S. 514	12
Barnes v. United States, 412 U.S. 837, (1973)	17
Klopfer v. North Carolina, 386 U.S. 213	11

People v. Loomis, 35 Misc. 2d 41, 230 N.Y.S. 2d 368 .. 12

People v. Lupo, 74 Misc. 2d 679, 345 N.Y.S. 2d, 348 (Criminal Court: New York County, 1973) 13

Strunk v. United States, 412 U.S. 434, (1973) 13

U.S. v. Marion, 404 U.S. 307, (1971) 11

Wylie v. Wainwright, 361 F. Supp. 914, (S.D. Fla., 1973) 13

OTHER AUTHORITIES

McCormick on Evidence, 2nd Edition, 1972 at pages 655-656 16

Rules of Appellate Procedure, Rule 22 5

18 U.S.C. 2253 5

28 U.S.C. 1254, subdivision (1) 2

28 U.S.C. 2241 4

28 U.S.C. 2243 4

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Respondent.

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The petitioner EDWARD VASSALLO, prays that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Second Circuit entered August 16, 1974, (appendix A, infra) which denied petitioner's application thereto for a certificate of probable cause to further appeal to that Court, from the judgment and decision of the United States District Court, Eastern District of New York denying an application for a certificate of probable cause for leave to appeal to the said United States Court of Appeals, Second Circuit, from the judgment of the said United States District Court for the Eastern District of New York, denying the petitioner's application for a writ of habeas corpus to issue on the grounds that the said petitioner was restrained in his liberty and held in custody by the said respondent under a judgment of conviction of the Supreme Court, State of New York, County of Queens, in violation of the said

petitioner's rights under the 6th and 14th Amendments (right to a speedy trial) and in further violation of the 5th and 14th Amendments to the Federal Constitution (privilege against self-incrimination) all as hereinafter set forth.

THE OPINION OF THE COURT BELOW:

There was no opinion of the said United States Court of Appeals, Second Circuit, but merely an order denying the petitioner's application for a certificate of probable cause and leave to appeal thereto from the judgment of the United States District Court, Eastern District of New York (Appendix A, infra).

The decision, opinion and judgment of the said United States District Court of the Eastern District of New York denying relief to the petitioner in regard to his application for a writ of habeas corpus to issue is annexed hereto (Appendix B, infra).

JURISDICTION

The order of the said United States Court of Appeals for the Second Circuit is dated August 16, 1974. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254, subdivision (1) and 28 U.S.C. 2101, subdivision (c).

THE QUESTIONS INVOLVED:

1. Was the Court below correct in denying petitioner's application for a certificate of probable cause to issue so that petitioner could appeal thereto, from the order or judgment of the United States District Court, Eastern District of New York, denying an application for a cer-

tificate of probable cause so that petitioner could further appeal to the said Court of Appeals Second Circuit from the order or judgment of the United States District Court, Eastern District of New York, denying petitioner a writ of habeas corpus where the petitioner alleged and showed that he was denied a speedy trial by the State of New York, and it was shown in the United States Court of Appeals for the Second Circuit when the respondent opposed the application for leave to further appeal thereto, that the State authorities made certain misrepresentations in the State trial court that denied petitioner's motion to dismiss the indictment because he was denied a speedy trial?

2. Was the state trial court correct when it charged the jury that it could consider the unexplained flight by petitioner as proof of guilt?

THE PRINCIPLE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. The Constitution of the United States, Amendment 5 in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ."

2. The Constitution of the United States, Amendment 6 in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

3. The Constitution of the United States, Amendment 14 in part:

"1. Section 1. All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

4. 28 U.S.C. 2241:

"Power to Grant Writ.—(a) Writs of habeas corpus may be granted by the Supreme Court, any Justice thereof, the District Courts and any Circuit Judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the District Court of the district wherein the restraint complained of is had."

(b) ***

(c) The writ of habeas corpus shall not extend to a prisoner unless—(1) *** (2) *** (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or . . ."

5. 28 U.S.C. 2243:

"Issuance of Writ—Return—Hearing—Decision—A Court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted unless it appears from the application that the applicant or person declined is not entitled thereto."

"The Court shall summarily hear and determine the facts and dispose of the matter as law and justice require. . ."

6. 18 U.S.C. 2253

"Appeal—In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the Circuit where the proceeding is had."

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for committment or trial, a person charged with criminal offense against the United States, or to test the validity of his intention pending removal proceedings."

"An appeal may not be taken to the Court of Appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

7. Rules of Appellate Procedure, Rule 22:

"(a) ***

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process

issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the Court of Appeals with a notice of appeal and the filing of the proceedings in the District Court. If the District Judge has denied the certificate the applicant for the writ may then request issuance of a certificate by a circuit judge. If such request is addressed to the Court of Appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the Court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the Court of Appeals. If an appeal is taken by a state or its representatives, a certificate of probable cause is not required."

STATEMENT OF THE CASE

The said petitioner was indicted for murder by a grand jury of Queens County in the County of Queens, City and State of New York. After a trial before a court and jury, the jury did not return a verdict of guilty of murder, but instead convicted the said petitioner of a lesser included crime, namely manslaughter in the first degree under Section 125.20(1) of the Penal Law of the State of New York. As a consequence of said conviction, the said petitioner was sentenced to a jail term of twelve (12) years in the State penitentiary. The said relator in exhausting his

state remedies, as required by 28 U.S.C. 2254 took the following steps:

(a) An appeal to the Supreme Court of the State of New York, Appellate Division, Second Department. That Court affirmed the judgment of conviction without an opinion;

(b) An application for leave to further appeal to the Court of Appeals of the State of New York, the court of last resort in the State of New York. That application was denied by an Associate Judge thereof, the Honorable Sol M. Wachtler.

In the United States District Court for the Eastern District of New York where this proceeding was originally had, the respondent made no claim that the said petitioner did not exhaust all his state remedies.

The facts underlying the claims herein presented by the said petitioner are as follows: The decedent in this case was named Scully. It appeared that the relator and a co-defendant EDWARD FIORVANTE, were jointly indicted for the crime of murder, namely the intentional killing of Scully. Previous to the trial of the said petitioner, the co-defendant pled guilty to the crime of manslaughter. The petitioner chose to go to trial. The case against the said petitioner was based mainly on circumstantial evidence. The petitioner did not take the stand. As part of the prosecution's case, the District Attorney sought to show that the said petitioner fled after the incident. The date of the incident or homicide was October 20, 1968. On October 23, 1968 the authorities investigated this case and sought to arrest the petitioner but they were unsuccessful. Two years later petitioner was arrested in the State of New Jersey, namely on September 27, 1970 for a traffic violation. He engaged counsel and voluntarily waived extradiction from New Jersey to the State of New York and

voluntarily appeared in the Supreme Court, Queens County, the trial court where he pled not guilty to the indictment. At that time he was released on bail. Subsequently after the petitioner moved to dismiss the indictment for failure to afford him a speedy trial, he was taken off bail and paroled until the time of trial.

The petitioner was arraigned on the indictment in June of 1971; he was bailed. On May 30, 1972 the petitioner moved to dismiss the indictment for failure to afford him a speedy trial; the District Attorney of Queens County opposed the motion and it was ultimately denied. Again the petitioner moved the Court for a dismissal of the indictment on the same grounds urged in the first motion. This time in opposing the motion the District Attorney argued that two essential witnesses, namely a Julio Lopez and Marie Fiorvante, were necessary for the prosecution's case and that Julio Lopez was living in Puerto Rico and that extradition was necessary. The District Attorney further averred that Marie Fiorvante lived in Queens (N.Y.) and was a material witness. However it was borne out at trial that Julio Lopez stated that he voluntarily went to Puerto Rico; that the District Attorney of Queens County knew about it; that he called the District Attorney from Puerto Rico collect by telephone but the District Attorney refused the call; furthermore, Julio Lopez testified that when he got to Puerto Rico he informed the authorities of his whereabouts. In regard to Marie Fiorvante, it was admitted by the prosecutor that she was in Queens at all times within the venue of the Trial Court. At trial the prosecutor never even called Marie Fiorvante as a witness although she was present in the courthouse.

After moving again for a dismissal of the indictment on the grounds that petitioner was denied a speedy trial, the Court then granted the motion conditionally on November

9, 1972. In determining the motion petitioner was taken off bail and paroled (this apparently was to preclude petitioner from moving for a writ of habeas corpus in the Supreme Court, State of New York on the ground that it would be moot). The Court then stated that the petitioner was prejudiced because the State did not afford him a speedy trial but the Court in deciding the motion further ruled that the motion to dismiss the indictment was granted unless the prosecution brought the matter to trial before June 4, 1973. It will be recalled that the date of that decision was November 9, 1972. A copy of the State Court decision is annexed hereto (Appendix C, infra).

It next appears that when a written application was made by the petitioner to the said United States Court of Appeals for the Second Circuit for the issuance of a certificate of probable cause, the respondent alleged in an affidavit in opposition to that motion that:

> "Thirdly, petitioner claims that there was a question of fact as to whether the witnesses were missing. The record of the state proceedings does not raise any genuine issue of fact on the issue. Of course, the testimony in the record was not without discrepancy but this is customary with most contested proceedings (United States v. Wilkins, 333 F. 2d 742 (2d Cir. 1964))".

At the hearing on the application in the United States District Court, Eastern District of New York, the Court was afforded appellate briefs that were served and filed by the petitioner and the respondent. No evidentiary hearing was held. However, the petitioner did present to that Court a factual issue namely that the State court considered certain affidavits by the District Attorney as to missing witnesses that were submitted in opposition to the motion

to dismiss for failure to afford the petitioner a speedy trial. There was a question of fact as to whether the witnesses were missing and the further question as to whether the State made any meaningful effort to get these witnesses. Petitioner contended that the prosecutor could have easily procured these witnesses and thus afforded the petitioner his Constitutional right to a speedy trial. No evidentiary hearing was held in the United States District Court, Eastern District of New York.

The trial court in its charge to the jury stated in effect that the jury may consider the flight of the petitioner but the Court also stated that if the flight were unexplained that could be weighed in regard to assessing the guilt of the petitioner. Counsel for petitioner clearly asked, at that time, that the trial court tell the jury that the petitioner had no duty to explain anything and that the jury need not entertain any inference from any unexplained flight. The trial court did tell counsel that the petitioner need not explain anything, but the record showed that the particular portion of the charge which was the basis for the Court's assertion is found 20 pages before the portion of instructions complained of.

REASONS FOR GRANTING THE WRIT:

A. THE ISSUE AS TO THE SPEEDY TRIAL:

It is undisputed that the record of the trial shows that petitioner was arraigned in the trial court June 1971 and thereafter on May 30, 1972 moved for a dismissal of the indictment for failure to afford him a speedy trial relying on the 6th and 14th Amendments to the Federal Constitution. That motion was summarily denied. Again petitioner moved the Court for a dismissal of the indictment for the same grounds. This time in opposing the

motion, the District Attorney argued that the two essential witnesses named hereinabove were necessary for the prosecution's case and that the extradition as to one of them who was in Puerto Rico was necessary; it was admitted that the other one, Marie Fiorvante, lived in Queens and she had to be made a material witness. This conflicted with a statement by Lopez at his arraignment as a material witness. In regard to Marie Fiorvante who was really Lopez' sister it was admitted by the District Attorney that she was in the immediate vicinage of the Court, namely Queens County, New York. Ironically, she was never called as a witness by the prosecution. When petitioner made his first motion in the State Court, the District Attorney alleged that Marie Fiorvante, for a period of time, was held as a material witness in the Civil jail and that thereafter she was held on $100,000 bail as a material witness. Subsequently however this was reduced to $5,000. In other words, there were misrepresentations made to the Tria. Court who denied the motion when it was initially made.

When a motion was made the second time for a dismissal the Court granted the motion "conditionally". In other words the Court granted the motion on condition that the prosecution bring the case on for trial within seven (7) months. Put another way, the Trial Court granted Petitioner's motion to dismiss for failure to afford him a speedy trial and then gave the prosecution a seven (7) month adjournment to bring it for trial.

In 1967 this Court held that it is a due process right to afford an accused a speedy trial as guaranteed by the 6th Amendment to the Federal Constitution; see *Klopfer v. North Carolina*, 386 U.S. 213. There is no issue that was presented to this Court in *U.S. v. Marion*, 404 U.S. 307, (1971) because the petitioner asserted his right after he was arrainged on the indictment.

In *Barker v. Wingo*, 407 U.S. 514 this Court held that an accused who failed to demand a speedy trial may not be considered as having waived his right although this did not relieve him entirely of his duty to make the motion. There is no question that petitioner moved before the Trial Court for the relief. While this Court held in *Barker v. Wingo, supra*, that there can't be a generalized concept in regard to a speedy trial, this Court further held the circumstances of each particular case must be examined and, laid down the following standards, namely: the nature of the crime, the extent of the delay, the prejudice to the accused (that is whether he was on bail or in custody), the time reasonably required in preparation for trial, the temporary absence or unavailability of witnesses, and whether the delay was contributed by the proceedings instituted by the accused. However, it would seem that the delay herein as delinated by the Trial Court was due to the inaction of the prosecutor. There was no real effort made by the prosecutor to secure the attendance of the witnesses the prosecutor claimed were so sorely needed at trial. It seems to be the law in New York that even where a defendant is missing and can't be arraigned promptly on an indictment, that such does not constitute a waiver of his right to a speedy trial. In *People v. Loomis*, 35 Misc. 2d 41, 230 N.Y.S. 2d 368, an indictment that was pending for fifteen (15) months was dismissed because of lack of prosecution where the accused lacked any specific knowledge in this period of the indictment as was simply contacted by the police on separate occasions and told that the police were seeking him without telling him about an indictment. There doesn't seem to be any evidence in this case that the defendant specifically knew he was indicted when he was absent from the State jurisdiction. As was held in *U.S. v. Marion*, 404 307 (1971), an indictment will be dismissed for failure to prosecute where the prosecution delays a trial

to gain a technical advantage over an accused. It is respectfully submitted that in this case, the prosecution was so lax in securing the attendance of its allegedly necessary witnesses, that they evaded their responsibility to the public as well as to the defendant to bring this case to a speedy conclusion. Thus, in *Wylie v. Wainwright*, 361 F. Supp. 914, (S.D. Fla., 1973), a writ of habeas corpus was granted and the accused released from custody on the basis of a denial of a speedy trial where there was a two (2) year delay caused by the inadvertance and negligence of the state prosecutor. In New York State in *People v. Lupo*, 74 Misc. 2d 679, 345 N.Y.S. 2d, 348 (Criminal Court: New York County, 1973), a charge was dismissed because the prosecution was not ready for trial within a ninety (90) day period for a misdemeanor, where the delay beyond the ninety (90) day period was caused by the good faith mistakes on the part of the prosecution, the police and the Court itself. Thus there the defendant was originally charged with a felony where he should have been charged with a misdemeanor. The Court stated that the District Attorney should have exercised due diligence in preparing the complaint and the Court remitting the matter to a grand jury for an indictment instead of affording the defendant a hearing in accordance with state practice.

However, it is submitted, that the State court in this case by granting the motion should have done so absolutely and not "conditionally".

In *Strunk v. United States*, 412 U.S. 434, (1973) see footnote 2 at page 439, the accused was charged with the commission of a federal offense. He moved for a dismissal of the indictment on grounds that he was denied a timely trial. The trial court denied the motion but the Circuit Court of Appeals reversed and decided that the accused was denied a speedy trial. However the Circuit Court did not dismiss the indictment, but afforded the accused a

limited form of relief by reducing his sentence commensurately with the length of the delay. This Court reversed, deciding that the only remedy for the denial of a speedy trial was a dismissal of the indictment. This Court held that it was not merely because of the rights of the accused including the subjectivism involved, namely the strain and anxiety, but also that public interest demands that a prompt disposition of the criminal charges be had. That such public interest was just as vital as the constitutional guarantee of a speedy trial under the 6th and 14th Amendments to the Federal Constitution.

However the issue before the Court below, namely the United States Court of Appeals for the Second Circuit, was that the District Court should have afforded an evidentiary hearing in regard to the misrepresentations made by the prosecutor when the motions to dismiss the indictment in the state court were made. It simply was not that the prosecution could not procure its vital witnesses. Their own witness testified at trial that he gave the authorities his address in Puerto Rico. A hearing should have been afforded the petitioner so as to determine whether the state was negligent and careless in bringing this case for trial within a reasonable period of time after the petitioner was arraigned. As shown, this is recognized in part because the respondent in opposing the motion for a certificate of probable cause in the Court below stated that there were discrepancies in the various affidavits of the prosecuting authorities but the respondent sought to be relieved because these are deemed to be usual or ordinary discrepancies. We can't understand how trained District Attorneys, members of the bar, prosecutors, can make affidavits out that contain discrepancies or contradict each other especially in regard to the assertion of a federally secured, basic constitutional right.

It is respectfully submitted that because the respondent

made the aforementioned admissions, the record before the District Court was not conclusive so as to preclude the holding of an evidentiary hearing in regard to the aforementioned.

B. AS TO THE ISSUE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION:

As part of the case against the petitioner in the State Court, the prosecution attempted to show that the petitioner fled after the incident which occurred October 20, 1968. On October 23, 1968 the State authorities investigated this case and sought to arrest the petitioner but they were unsuccessful. About two (2) years later the petitioner waived extradition from New Jersey and voluntarily appeared in the Trial Court and pled guilty to the indictment and was placed on bail.

In charging the jury, the Court charged as to flight stating in substance that generally the acts and conduct of an accused following the commission of an alleged crime such as flight or concealment are questions for the jury to consider and that "when unexplained by the defense or when falsely explained, may be deemed indicative of a consciousness of guilt on the part of defendant." It was further charged by the Court that the jury can consider in this connection whether an innocent man runs away or hides something or hides himself, the Court concluding in its charge that ordinarily flight as evidence is of little value and is of no value whatever "unless there are facts pointing to the motive that may have prompted such action. Any explanation of the accused must always be considered in connection therewith." Petitioner never took the stand. Instead, petitioner took exception to that portion of the charge asserting the privilege against self-incrimination guaranteed by the 5th and 14th Amendments to the

Federal Constitution. In this case the jury was told that they could consider an explanation of that by the defendant. This was absolutely meaningless and detrimental to the petitioner because the petitioner never took the stand. Furthermore, the petitioner had no duty to explain anything. In regard to the role of "inferences" that might be given to a jury in a consideration of an accused's failure to explain the same, the same has not supplanted the privilege against self-incrimination. Counsel further specifically pointed out to the Court that the jury should be told that they do not have to consider any explanation of flight by the defendant because the defendant didn't testify and that further the petitioner had no duty to explain anything. The Court stated that the subject matter of the defendant's exceptions were covered in the charge and acknowledged that the defendant had no duty to explain anything because of the presumption of innocence. However the presumption of innocence when charged to the jury were not proper under State law. Realistically however, this Court's attention is drawn to the fact that the portion of the charge complained of was found on page 640 of the record on appeal but in regard to the presumption of innocence charged to the jury that was found on pages 608 and 609 of the record on appeal.

Firstly, it is submitted that flight and consciousness of guilt arising therefrom are weak facets of evidence; see *McCormick on Evidence,* 2nd Edition, 1972 at pages 655-656. Thus it is explained there that:

> "If the flight is from the scene of crime, evidence of it seems to be wholly acceptable as a means of locating the accused at the critical time and place. However, in many situations, the inference of consciousness of guilt of the particular crime is so uncertain and ambiguous and the evidence so

prejudicial that one is forced to punishing the 'wicked' generally rather than resolving the issue of guilt of the offense charged. Particularly troublesome are the cases where defendant flees when sought to be arrested for another crime, or is wanted for another crime, or is not shown to know that he is suspected of the particular crime. Is a general sense of guilt to be accepted? Perhaps the chief offenders are the cases of attempted suicide."

"The entire area calls for closer scrutiny of the validity of the suggested inference under the facts and circumstances of each particular case."

As was stated in *Barnes v. United States*, 412 U.S. 837, (1973) at page 846:

". . . since the inference thus satisfies the reasonable-doubt standard, the most stringent standards the court has applied in judging permissive criminal law inferences, we conclude that it satisfies the requirements of due process."

Furthermore, the trial court did not explain to the jury that the inference could be rebutted by any evidence independent of the petitioner's testimony (see 412 U.S. 846, 847.)

It is to be noted that when this Court submitted rules of proposed evidence to Congress, Congress partially acted upon the same in the 93rd Congress, Second Session, H.R. 5463, in the Senate of the United States, February 7, 1974, but from the Committee of the Judiciary stated as follows:

"Proposed Rule 303: Rule 303, as submitted by the Supreme Court, was directed to the issues of when,

in criminal cases, a court may submit a presumption to a jury and the type of instruction it should give. The committee deleted this Rule since the subject of presumptions in criminal cases is addressed in detail in bills now pending before the Committee to revise the federal criminal code. The Committee determined to consider this question in the course of its study of these proposals. . ."

Thus, this area of inference and presumptions in criminal law seems to be the subject of weighty concern involving the 5th Amendment value of the privilege against self-incrimination.

CONCLUSION:

It is respectfully submitted that this petition for a writ of certiorari be granted.

Dated: New York, New York
November 6, 1974

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Petitioner
A Member of the Bar of the
United States Supreme Court

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of , one thousand nine hundred and

---

United States ex rel. Edward Vassallo,

Relator-Appellant,

v.

Arthur Rubin, Warden of the Queens House of Detention for Men,

Respondent-Appellee.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated July 2, 1974 for a certificate of probable cause be and it hereby is denied.

s/ James L. Dohi
s/ Marvin E. Frankel, U.S.D.J.
s/Robert J. Keller, U.S.D.J.
Circuit Judges

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. EDWARD VASSALLO,

Relator,

-against-

ARTHUR RUBIN, Warden of the Queens House of Detention for Men,

Respondent.

Appearance:

ARNOLD E. WALLACH, ESQ.
Attorney for Relator

J U D D, J.

STATEMENT

Relator has applied for a certificate of probable cause in aid of an appeal to the Court of Appeals from this court's Memorandum and Order dated June 13, 1974 which denied an application for federal habeas corpus. A four-page memorandum was written to set forth the basic facts and the reasons for dismissing the petition. The same reasons constitute an adequate statement of the reasons why a certificate of probable cause should not issue.

Relator may, of course, apply to a Circuit Judge pursuant to F.R.A.P. §22(b) for the issuance of such a certificate.

s/ ORRIN G. JUDD
U.S.D.J.

APPENDIX "C"

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
EDWARD VASSALLO,

Relator,

-against-

ARTHUR RUBIN, Warden of the Queens
House of Detention for Men,

Respondent.

June 13, 1974

Appearances:

ARNOLD E. WALLACH, ESQ.
Attorney for Relator

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for Respondent

By: BURTON HERMAN, ESQ.
Assistant Attorney General

JUDD, J.

Relator, a state prisoner, has applied for federal habeas corpus.

Facts

Relator was convinced of manslaughter in the first degree after a trial before a jury in Queens County Supreme Court on an indictment charging him with murder. He was sentenced to a jail term of 12 years. It appears that state remedies have been exhausted.

Relator complains of errors in the trial court's charge in regard to the effect of flight and presumptions arising therefrom. Relator also asserts that his right to a speedy trial was improperly denied.

The killing took place on October 20, 1968. A search for relator by a New York City detective was unsuccessful. He was arrested in New Jersey on September 27, 1970, for a traffic violation, and showed a driver's license in another name. He was not arrested on the murder charge until June 1971. He was released on bail, and the case was set for trial on December 6, 1971 after disposition of defense motions. Further adjournments ensued, over defendant's objections, because of the district Attorney's inability to obtain the presence of two allegedly essential witnesses. On November 9, 1972, seventeen months after his arrest, relator's motion to dismiss the indictment for lack of a speedy trial was conditionally granted, unless the people were ready for trial by June 1, 1973, his bail was exonerated, and he was placed on parole. The court found that the delay up to that date was adequately explained, but that defendant was prejudiced by the lack of a firm trial date. Relator asserts that the court, instead of paroling him without bail, should have dismissed the indictment. His trial began on June 1,

1973, after a couple of days of hearings and jury selection.

The court charged the jury concerning the presumption of innocence, the burden of proof, and the fact that the defendant had no burden to prove his innocence, and that no inference could be drawn from the defendant's failure to take the witness stand. On the subject of flight, the court charged that it might be considered as indicative of a consciousness of guilt "when unexplained by the defense or falsely explained."

Discussion

The trial court's instructions concerning the effect of flight after the commission of an alleged crime were proper and cannot be characterized as a comment on relator's failure to take the witness stand. Cases in this circuit decided since *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965), make it clear that comments by the prosecution on the failure of the defense to produce evidence contradicting the government's case are not improper where the comment does not "naturally and necessarily" refer to the defendant himself. *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050, 90 S.Ct. 1388 (1970); *United States v. Nasta*, 398 F.2d 283 (2d Cir. 1968).

In this case the trial court referred generally to the defense and not to the defendant himself. Moreover, the judge correctly instructed the jury on defendant's right to remain silent and on the burden of proof. In this context, the comments in the charge cannot be considered a violation of defendant's privilege against self-incrimination. There is nothing to the contrary in *Barnes v. United States*, U.S. , 93 S.Ct. 2357 (1973), which relator cites.

The delay in bringing relator to trial after he had been returned to the jurisdiction of the New York courts was caused by difficulties in locating a key prosecution witness. Such a delay is a factor to be considered in connection with a claim of deprivation of a right to a speedy trial. *United States v. Fasanaro,* 471 F.2d 717 (2d Cir. 1973).

The conditional granting of a motion to dismiss is not the same as a determination that there has been a denial of the right to a speedy trial. The case of *Strunk v. United States,* 412 U.S. 434, 93 S.Ct. 2260 (1973) is therefore inapplicable.

It is ORDERED that the petition be dismissed.

s/ORRIN G. JUDD
U.S.D.J.

APPENDIX "D"

At a Criminal Term, Part VI, of the Supreme Court, held in and for the County of Queens, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, New York, on the 18th day of December, 1973

PRESENT:

Hon. GEORGE J. BALBACH
Justice

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDWARD VASSALLO,

Defendant

The following papers numbered 1 to 2 submitted in this motion, Notice of Motion and Affidavits Annexed, papers numbered 1-2.

Upon the foregoing papers, and the opinion of the Court herein, the application is denied.

GRANTED:

Dated December 18, 1973
John J. Durante

GEORGE J. BALBACH
J.S.C.

Submitted October 4, 1973

APPENDIX "E"
MEMORANDUM

SUPREME COURT QUEENS COUNTY
CRIMINAL TERM PART VI

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDWARD VASSALLO,

Defendant.

BY GEORGE J. BALBACH, J.

DATED December 18, 1973

Defendant moves for an order pursuant to section 44010 of the Criminal Procedure Law, vacating a judgment of conviction and granting him a new trial.

The defendant herein was indicted by a Queens County Grand Jury on November 12, 1968 and charged with the crime of murder. On June 8, 1973, after a jury trial, he was found guilty of manslaughter, first degree. On July 12, 1973, the defendant was sentenced to an indeterminate term the maximum of which was not to exceed 12 years. A notice of appeal to the Appellate Division, Second Department, was filed on July 25, 1973.

Defendant now seeks to vacate the judgment of conviction based on the decision of the Appellate Division, Second Department, in *People v. George Attard*, 346 NYS 2d 851, which held that the summation by the Assistant

District Attorney was both improper and highly prejudicial and denied defendant a fair trial and the charge by the Court concerning the presumption of innocence was confusing in that from it the jury could have been under the erroneous impression that the presumption of innocence continues only until they, in their discretion, shall decide that it should end.

The defendant in his moving papers claims that the Court's charge as to presumption of innocence is the same as in the *Attard* case. If defendant feels that this issue alone justifies reversal of the jury's verdict, it is clearly a matter of record (*People v. Sadness*, 300 N.Y. 69), and may be presented in the appeal now pending before the Appellate Division.

Based upon the foregoing, the application is hereby denied.

The clerk of the Court is directed to mail a copy of this decision and order to the attorney for the defendant.

GEORGE J. BALBACH
J.S.C.

DEC 19 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-564

EDWARD VASSALLO,

Petitioner,

against

ARTHUR RUBIN, Warden of the Queens House of Detention for Men,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons Why Certiorari Should be Denied	3
Conclusion	5

TABLE OF CASES

Barker v. *Wingo*, 407 U.S. 514, 431 (1972)	4
Barnes v. *United States*, 412 U.S. 837, 846 n. 12 (1972)	5
Cupp v. *Naughten*, 414 U.S. 141, 149 (1973)	5
Donnelly v. *De Christoforo*, 416 U.S. 637, 642-643 (1974)	5
Griffin v. *California*, 380 U.S. 609 (1965)	5
Moore v. *Arizona*, 414 U.S. 25, 27 (1973)	4
Strunk v. *United States*, 412 U.S. 434 (1973)	4
United States v. *Gainey*, 380 U.S. 63, 70-71 (1965)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

EDWARD VASSALLO,

Petitioner,

against

ARTHUR RUBIN, Warden of the Queens House of Detention for Men,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

On June 13, 1974, the United States District Court for the Eastern District of New York (JUDD, J.) dismissed petitioner's application for a writ of habeas corpus. A copy of the unreported memorandum appears in Appendix C in the Petition for a Writ of Certiorari. On June 28, 1974 the District Court denied petitioner's application for a certificate of probable cause. On August 16, 1974 the United States Court of Appeals for the Second Circuit also denied petitioner's motion for a certificate of probable cause. Copies of these orders appear in Appendices B and A respectively in the Petition for Writ of Certiorari.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. § 1254(1).

Questions Presented

Does a contention as to denial of the right to a speedy trial raise a substantial constitutional issue where the first part of the delay was caused by the defendant's flight from the Court's jurisdiction and the second part of the delay was due to the People's difficulty in locating two essential witnesses, and where there is no claim that the defendant was prejudiced by the delay?

Does a contention as to violation of the privilege against self incrimination by a trial court's charge to a jury raise a substantial constitutional issue where there was no comment on petitioner's failure to testify, and where the instruction on the subject of flight could not properly be characterized as comment on petitioner's failure to take the stand, and where the trial court correctly instructed the jury on the defendant's right to remain silent?

Statement of the Case

On July 12, 1973, at a Term of the Supreme Court, Queens County, petitioner was sentenced to state prison for a maximum term of 12 years after being convicted of the crime of manslaughter in the first degree by the verdict of a jury. The judgment of conviction was affirmed 43 A D 2d 948, 351 N.Y.S. 2d 952. Application to appeal to the New York Court of Appeals was denied.

Petitioner's contentions as to denial of his right to a speedy trial, and violation of his privilege against self incrimination were rejected by the District Court after a review of the Record on Appeal in the state courts. The

material facts relating to these contentions are set forth in the Judge's opinion and they are reproduced here as follows:

The homicide occurred on October 20, 1968. A search for petitioner by a New York City detective was unsuccessful. On September 27, 1970 he was arrested in New Jersey for a traffic violation, and he showed a driver's license in another name. In June of 1971 he was arrested on the murder charge and he was returned to the jurisdiction of the New York courts. He was released on bail. Subsequently, the bail was exonerated and he was placed on parole. The case was set for trial on December 6, 1971 following disposition of defense motions. Further adjournments ensued over defendant's objections because of the District Attorney's inability to obtain the presence of two essential witnesses. On November 9, 1972 petitioner's motion to dismiss the indictment for lack of a speedy trial was granted unless the People were ready for trial by June 1, 1973. The Court found that the delay up to that date was adequately explained but that petitioner was prejudiced by the lack of a firm trial date.*

The court charged the jury concerning the presumption of innocence, the burden of proof, the fact that the defendant had no burden to prove his innocence, the defendant's right to remain silent and that no inference could be drawn from the defendant's failure to take the witness stand. On the subject of flight the Court charged that it might be considered as indicative of a consciousness of guilt "when unexplained by the defense or falsely explained."

Reasons Why Certiorari Should be Denied

I. Petitioner contends that he was denied his right to a speedy trial. The District Judge, after a review of the Record on Appeal in the state courts correctly rejected the

* The trial in fact commenced within the time limit imposed by the Court.

contention. The claim considered in the light of the facts disclosed by the record does not raise a substantial issue.

First, the delay from October 20, 1968, when petitioner committed the crime through June of 1971 when he was arrested for it was caused by his flight from the jurisdiction of the court. The delay during this period of time must be attributed solely to petitioner.

Secondly, the delay from June of 1971 when he was arrested in New Jersey through June 1, 1973 when the trial began, was due to the People's difficulty in locating two essential witnesses.* This was adequate justification for the delay. As it was stated in *Barker* v. *Wingo,* 407 U.S. 514, 531 (1972):

> "Closely related to the length of the delay is the reason the government assigns to justify the delay . . . a valid reason, such as a missing witness, should serve to justify appropriate delay."

See also *Strunk* v. *United States,* 412 U.S. 434 (1973).

Thirdly, prior to trial petitioner was released on bail and thereafter bail was exonerated and he was placed on parole. Petitioner does not claim that his defense was impaired by reason of the delay. The element of prejudice from the delay is absent here. See *Barker* v. *Wingo, supra,* p. 532; *Moore* v. *Arizona,* 414 U.S. 25, 27 (1973).

II. Petitioner contends that the judge's charge to the jury violated his privilege against self incrimination. The contention is unsupported by the record. As the District Judge noted, the trial court correctly instructed the jury on petitioner's right to remain silent and that no inference could be drawn from petitioner's failure to take the wit-

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* Petitioner's contention that the District Attorney made misrepresentations to the trial court with respect to the witnesses (Pet., pp. 11; 14) is without merit.

ness stand. In fact, there was no comment on petitioner's failure to testify. See *Griffin* v. *California,* 380 U.S. 609 (1965).

On the subject of flight the trial court charged that it might be considered as indicative of consciousness of guilt "when unexplained by the defense or falsely explained." As the District Judge noted, the court referred generally to the defense and not to the defendant himself. The instruction could not properly be characterized as comment on petitioner's failure to take the witness stand. See *Barnes* v. *United States,* 412 U.S. 837, 846, n. 12 (1972); *United States* v. *Gainey,* 380 U.S. 63, 70-71 (1965).

The Court correctly charged the jury concerning the presumption of innocence and the State's duty as to the burden of proof, and no issue of constitutional dimension arises here as to any undercutting of these instructions. See *Cupp* v. *Naughten,* 414 U.S. 141, 149 (1973); *Donnelly* v. *De Christoforo,* 416 U.S. 637, 642-643 (1974).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, December 4, 1974.

Respectfully submitted,

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Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General
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